78-1281

Supreme Court, U. S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1978

IOWA BEEF PROCESSORS, INC.,

Petitioner,

vs.

NEAL SMITH, Chairman of the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, United States House of Representatives,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Iowa Beef Processors, Inc. ("IBP") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, holding that although the District Court for the Northern District of Iowa committed a clear abuse of discretion by modifying its protective order to permit a congressional subcommittee to subpoena privileged IBP documents in the hands of its litigation adversary, the Court was nevertheless powerless to grant relief because the documents had been seized before IBP's counsel were informed of the modification and could appeal.

OPINIONS BELOW

The opinions of the Court of Appeals for the Eighth Circuit (App. A-22-32) and the United States District Court for the Northern District of Iowa (App. A-13-14) are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 7, 1979. This Court has certiorari jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a District Court order modifying a protective order under Federal Civil Rule 26(c)(7) to permit the custodian of privileged documents produced during discovery to comply with a congressional subcommittee's subpoena is a final decision from which an appeal lies under 28 U.S.C. §1291 and the "Collateral Order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), so that—

   (a) The modification order is immediately appealable by the party whose documents and privilege are at stake, but who otherwise would have no opportunity for appellate review of its claims; and

   (b) The modification order is a "judgment" within the meaning of Federal Civil Rule 54(a), and the automatic stay provision in Rule 62(a) applies to preclude enforcement of the modification order and the Subcommittee's subpoena for 10 days.

2. Whether the Circuit Court, having granted mandamus review of the merits and found clear error in the modification of the protective order, should have ordered the Subcommittee to return the privileged documents and

protected their contents against disclosure, using either its contempt power to remedy a violation of the protective order or its residual power under the All Writs Statute (28 U.S.C. §1651(a)) to preserve the integrity of its appellate jurisdiction and IBP's right to effective appellate review of the modification order.

3. Whether a congressional subcommittee may subpoena privileged documents in the custody of a party to federal court litigation which are subject to a protective order without obtaining Congressional approval and filing a formal intervention so that the terms and conditions of its access to the documents may be controlled by the Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Fifth Amendment, United States Constitution:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

28 U.S.C. §1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

28 U.S.C. §1651(a):

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 26(c)(7), F.R.Civ.Proc.:

> Upon motion by a party * * * and for good cause shown, the court in which the action is pending * * *

> may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * * (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way * * *.

Rule 54(a), F.R.Civ.Proc.:

> "Judgment" as used in these rules includes a decree and any order from which an appeal lies * * *.

Rule 62(a),(g), F.R.Civ.Proc.:

> (a) *Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings.* Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. * * * * * *
>
> (g) *Power of Appellate Court Not Limited.* The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

STATEMENT OF THE CASE

The undisputed facts reveal persistent efforts by a congressional subcommittee to obtain confidential business documents covered by two courts' protective orders, with out complying with established congressional and judicial procedures.

In 1977, IBP filed the diversity action out of which this controversy springs against a former executive, Hughes

A. Bagley, for breach of corporate fiduciary duty and breach of his termination contract covenant not to assist third parties in litigation against IBP, alleging that Bagley had disclosed confidential IBP documents and information to officials of the Amalgamated Meat Cutters and Butcher Workmen of America, AFL-CIO, and three lawyers, all of whom were also charged with aiding, abetting, and exploiting Bagley's breaches and conspiring to defame IBP. *Iowa Beef Processors, Inc.* v. *Gorman, et al.* (N.D. Ia., No. C 77-4040).

Two of the lawyers named as defendants in *Gorman,* Lex Hawkins and John Cochrane, represent Meat Price Investigators Association ("MPIA"), a group of cattlemen suing meat packers (including IBP) and supermarkets for conspiring to depress the price of cattle in multidistrict litigation (M.D.L. 248) pending before Judge William M. Taylor, Jr. in Dallas.

IBP initiated discovery in *Gorman* by filing a Rule 34 document request asking Bagley to produce for inspection and copying all IBP documents in his possession. In response, Bagley produced 7 packing boxes of documents which he had taken with him when he left IBP in July, 1975.

On October 26, 1977, IBP moved under Federal Civil Rule 26(c)(7) for a protective order preserving the confidentiality of IBP business information contained in the documents Bagley had produced and in his deposition, which had also been taken, "by restricting their use to defense counsel for the purposes of this case or to Hawkins' and Cochrane's use for the purposes of their antitrust case (M.D.L. 248) subject to the protective order in that case."

IBP's motion for protective order was resisted and briefed, but on February 13, 1978 Chief Judge McManus entered an order "limiting the usage of IBP's confidential business information * * *" as IBP had requested. (App. A-9)

On February 23, 1978, Representative Neal Smith of Iowa, as Chairman of the Committee on Small Business and its Subcommittee on SBA and SBIC Authority and General Small Business Problems, issued a subpoena duces tecum to MPIA's attorney, Hawkins, to produce "all documents given to you * * * by Hughes Bagley and any and all documents exhibits depositions or related materials taken in the case of *Iowa Beef Processors, Inc.* v. *Gorman, et al.* Civil #C77-4040." Although the documents sought had been produced and were covered by the protective order in the *Gorman* case, Hawkins applied not to Chief Judge McManus in Sioux City, but to District Judge Taylor in Dallas for permission to comply with the congressional subpoena.

On March 22, 1978 Judge Taylor refused to modify his protective order to permit Hawkins to comply with the Subcommittee's subpoena, holding that Congress had no right to "run roughshod" over a protective order just because it wanted to "get all of the information that some of the lawyers have":

> I think the orders of a Federal Court in its undertaking to dispose of cases, of lawsuits, have some significance and some importance.

In re Beef Industry Antitrust Litigation, 457 F.Supp. 210, 213 (N.D. Tex. 1978) (App. B-5).

The Subcommittee then, without formally intervening in the *Beef Industry Antitrust Litigation,* filed a motion

before Judge Taylor to grant Hawkins leave to comply with its subpoena or, in the alternative, for clarification or modification of his protective order. On August 17, 1978, Judge Taylor denied the Subcommittee's motion, holding that since Hawkins would not have had possession of the Bagley documents but for federal court discovery rules, the Subcommittee was violating the Due Process Clause of the Fifth Amendment by "interfering with the processes of a Federal Court in an individual case." *Id.,* at 213. (App. B-3)

Judge Taylor's ruling was appealed by the Subcommittee to the Fifth Circuit, which dismissed for lack of jurisdiction on February 2, 1979, holding that Congressman Smith and his Subcommittee had failed to follow the rules of the House of Representatives and should have obtained a resolution from the full House authorizing the filing of the motion to modify the protective order in Judge Taylor's court and to appeal Judge Taylor's adverse ruling. (App. B-7-15)

Meanwhile, on July 20, 1978, IBP had offered to cooperate with the Subcommittee's investigation and produce the documents sought, subject to appropriate safeguards as to confidentiality, even though IBP had never been informed of the reason for the Subcommittee's interest in the documents or the nature of its investigation. This offer was flatly refused by the Subcommittee. Instead the Subcommittee's Special Counsel stated that he intended to have his investigators interview Bagley during the week of September 25, 1978, and they would be instructed to inspect and copy documents which they considered relevant to the investigation. The Subcommittee refused to keep confidential any documents which it might obtain or seek court permission for disclosure.

Because of the Subcommittee's threat to review and copy the Bagley documents, despite Chief Judge McManus' protective order, IBP on October 11, 1978 filed a motion in the Sioux City case for an order authorizing the filing of the Bagley documents with the Clerk of the Court, "to be maintained thereafter under the control of the Court." Bagley did not oppose that motion. IBP's motion, if granted, would have required the Subcommittee to appear before Chief Judge McManus and grapple with the separation-of-powers question raised by the Subcommittee's subpoena rather than using a litigant (Bagley) as its proxy.

On October 30, 1978, while IBP's motion to impound the Bagley documents was pending, the Subcommittee issued a subpoena to Bagley, calling, *in haec verba,* for the production on November 7, 1978 of the same documents IBP had specified in its 1977 request for production of documents by Bagley in *Gorman.* On November 3, 1978 Bagley (caught between the court protective order and the Subcommittee subpoena) filed in the Sioux City case a motion to lift Chief Judge McManus' protective order so he could comply with the subpoena or, in the alternative, for guidelines as to how he should respond. IBP opposed Bagley's motion and urged that Bagley's predicament be resolved by granting IBP's motion to impound the documents so that the terms and conditions under which the documents might be released would be subject to court control. The Subcommittee informally agreed to postpone the return date of the subpoena until Chief Judge McManus ruled on the pending IBP and Bagley motions.

On Friday November 24, 1978 Chief Judge McManus filed an order denying IBP's motion to impound the documents and granting Bagley's motion to modify the protective order, stating (App. A-14):

> The Court can ascertain no great interference with its ability to proceed in this suit if the committee is allowed access to the records and the right to copy them as long as the originals still remain accessible to the parties to prosecute this action. IBP is free to approach the committee as to the scope of the use of the documents.

The Subcommittee learned of the entry of this order, and on Monday, November 27, the Subcommittee's investigator appeared at the offices of Bagley's counsel in Sioux City and took possession of Bagley's 7 boxes of IBP documents.

IBP's counsel, however, was not informed of Chief Judge McManus' modification order until Tuesday, November 28, when a copy of that order was received in the mail. Upon learning that the Subcommittee already had the documents, and at the request of Chief Judge McManus' Magistrate, IBP's counsel called the Subcommittee's Special Counsel to see if he would agree to impound the documents pending IBP's appeal from Chief Judge McManus' modification order. The Special Counsel refused, saying that now that the Subcommittee had possession of the documents, IBP was playing in a "different ballpark" where the courts had no power and that the Subcommittee had unfettered discretion to make public disclosure of the documents.

On November 29, 1978 IBP filed a Notice of Appeal to the Eighth Circuit and applied to the District Court for a stay of its modification order pending appeal, but the District Court took no action.

On December 4, 1978, the day on which the automatic 10-day stay on the enforceability of judgments was due to expire (Federal Civil Rule 62(a)), IBP applied to Eighth Circuit Judge Henley for a stay of Chief Judge McManus' modification order pending appeal and, under the All Writs Statute (28 U.S.C. §1651(a)), for an order "preserving appellate jurisdiction" by requiring the Subcommittee to return and not disclose the contents of the documents pending appeal. The Subcommittee's Special Counsel "specially appeared"[1] before Circuit Judge Henley in Little Rock and agreed to a temporary stay and non-disclosure of the documents until December 16 to permit the Eighth Circuit to consider IBP's motions in an orderly fashion. (App. A-15-16)

Pursuant to Judge Henley's request, both IBP and the Subcommittee submitted samples of the documents for the Court's *in camera* inspection. The samples plainly demonstrated that the documents contained attorney-client privileged materials and confidential IBP commercial data.

On December 14, after argument on December 12, an Eighth Circuit panel denied IBP's motion for a stay of Chief Judge McManus' modification order pending appeal and for an extraordinary writ to preserve appellate jurisdiction as being "inappropriate and unnecessary at this time" because the court accepted the "good faith" representations by the Subcommittee that it "has no intention of making public any of these documents" until after the

[1] Bagley, the formal appellee, informed the Court of Appeals that he would comply with the Court's resolution of the dispute and would not participate in the appeal unless the Court requested. Thus, the only party opposing IBP's appeal was the Subcommittee, which was not technically a party to the case.

House of Representatives reconvened in January, 1979 and that, meanwhile, the Subcommittee would take "all appropriate precautions" to insure that there would be no disclosure except to permit its staff to begin the job of collating and classifying. However, recognizing that the case "presents serious jurisdictional and substantive questions and implicates fundamental concepts of legislative and judicial authority", the Panel expedited hearing on the merits of IBP's appeal and scheduled oral argument for January 9, 1979. (App. A-17-21)

On February 7, 1979, the Eighth Circuit held that Chief Judge McManus' modification order was not appealable of right as a final order under 28 U.S.C. §1291, but that the Court nevertheless could reach the merits through use of mandamus. The Court then granted a writ of mandamus, vacated Chief Judge McManus' modification order, and remanded with directions to reinstate, in full, the protective order, holding that the District Court had committed a "clear abuse of discretion" by allowing "disclosure of these documents to the Subcommittee without any constraints on the Subcommittee's use thereof." Nevertheless, the Eighth Circuit refused to grant IBP's request for a writ compelling the Subcommittee to return the documents and maintain their confidentiality because its holding that Chief Judge McManus' modification order was not a final, appealable order under 28 U.S.C. §1291 also meant that the automatic 10-day stay provision of Federal Rule 62(a) did not apply.[2] Hence, the Court reasoned, although the modification order itself was a clear abuse of discretion, reviewable by mandamus, it was neverthe-

[2] Rule 62(a)'s automatic stay applies to "judgments," a term defined by Rule 54(a), F.R.Civ.Proc., as including orders "from which an appeal lies."

less in effect when the Subcommittee seized the documents on November 27 and no "existing court order" was violated by the seizure. (App. A-22-32) The Eighth Circuit, however, did not discuss IBP's contention that under the All Writs Statute, it had power to grant relief to IBP regardless of whether the protective order modification was stayed for 10 days under Federal Civil Rule 62(a).

This petition for certiorari to review the Eighth Circuit's failure to grant relief against the Subcommittee's seizure of the documents is coupled with a separate motion for a preliminary injunction requiring the return of the documents and preserving their confidentiality pending this Court's disposition of the certiorari petition and, if granted, the merits.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit concluded that IBP had suffered a clear wrong but had no remedy even though the Subcommittee's precipitous seizure of the documents frustrated IBP's right to effective appellate review of the modification order. To reach this result, the Eighth Circuit had to adopt a patently erroneous construction of the finality rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) which conflicts with decisions of this Court and of the Fifth and Seventh Circuits. If the District Court's error was appealable as of right, then the Subcommittee seized the documents in violation of the protective order because the automatic 10-day stay was in effect, and no court could tolerate such a flouting of its orders, even by a congressional subcommittee. In addition, the Eighth Circuit refused to discuss IBP's contention, based upon a recent decision of this Court, that even in the absence of a violation of a court order the federal courts are authorized by the All Writs Statute to issue a writ to a non-party who threatens to "frustrate the implementation of a court order or the proper administration of justice * * *." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 174 (1977).

A. The Non-Appealability Holding Conflicts With Rulings by This Court and Two Circuits.

The Eighth Circuit's use of mandamus, rather than appeal, to review Chief Judge McManus' modification order was a questionable use of the writ to avoid the consequences of a holding that the Subcommittee's seizure had violated the protective order.

Mandamus should not be used as a substitute for appeal, *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112, n.8 (1964), and should be granted only where a party has "no other

adequate means to attain the relief he desires", *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Here, perversely, the Eighth Circuit used mandamus to deny IBP relief for the substantive rights it found to have been violated. Three Justices of this Court recently criticized the Eighth Circuit's indiscriminate use of "the mandamus power to mask a questionable jurisdictional decision." *ACF Industries, Inc.* v. *Equal Employment Opportunity Commission*, No. 78-453 (Jan. 8, 1979; opinion of Mr. Justice Powell, joined by Mr. Justice Stewart and Mr. Justice Rehnquist, dissenting from denial of writ of certiorari).

The Eighth Circuit's holding that the modification order was not a final, appealable order conflicts with decisions of this Court and closely parallel decisions of the Fifth and Seventh Circuits that even a discovery order is appealable "where denial of immediate review would render impossible any review whatsoever of an individual's claims • • •." *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). The rationale for the line of cases relied on by the Eighth Circuit (see App. A-25), which deny immediate review of orders compelling testimony or production of documents, is that the witness has a choice: He may either comply or refuse and, if found in contempt, appeal the contempt order. *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940); *United States* v. *Ryan, supra*, at 532-533. But where a party asserting a privilege claim with respect to subpoenaed documents is not the custodian of the documents to whom the subpoena is directed and therefore cannot assert his claim by refusing to comply and obtaining appellate review of any contempt ruling, an order compelling compliance with the subpoena is final and appealable as of right; for otherwise there is no interested party to assert the privilege and its breach would be beyond effective appellate review. *Perlman* v. *United States*, 247 U.S. 7, 12-13 (1918); *Overby* v. *United States Fidelity and Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955); *American Tel. & Tel. Co.* v. *Grady*, 7th Cir. No. 78-2316, decided, December 14, 1978, *petn. for cert. pending*, No. 78-1063.[3]

This case falls squarely within the *Cobbledick-Ryan* rationale and the *Perlman-Overby-ATT* implementation of that rationale, and yet the Eighth Circuit refused even to discuss this line of cases. The Subcommittee's backdoor strategy, indiscriminately subpoenaing all of Bagley's IBP documents from IBP's litigation adversaries

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[3] The Seventh Circuit's recent holding was stated as follows:

> "The *Cohen* rule was explicitly not made applicable to orders respecting discovery in *Alexander* v. *United States*, 201 U.S. 117, 121 (1906) on the ground that a witness must first refuse to produce or to testify, and must be punished for criminal contempt, before a right to review arises.
>
> "The discovery order presently under review modifies an existing protective order in order to permit a non-party access to discovered materials. Because the discovery order directs MCI to turn over the discovered materials to the government, ATT does not have the option sanctioned in *Alexander* in order to challenge and stop the transfer of custody of the materials. For these reasons, this court finds *Alexander* to be inapposite, applies the "collateral order" doctrine of *Cohen*, and holds that the particular species of discovery order under review is final and appealable. *First Wisconsin Mortgage Trust* v. *First Wisconsin Corp.*, 571 F.2d 390, 393 (7th Cir. 1978) (adopted en banc). For the same reasons, the conditional petition for writ of mandamus filed by ATT is denied." [Footnote omitted.] [Cert. Petn. in No. 78-1063, App. A, 4a-5a.]

(first Hawkins, unsuccessfully, and then Bagley), was obviously designed precisely to avoid giving IBP a chance to assert its claim in the normal manner.[4]

As in *Perlman, Overby* and *ATT,* Bagley clearly had no interest in asserting IBP's claims with respect to the documents; and the modification order, if not appealable, would result in the loss of IBP's rights forever because of the Subcommittee's avowed intent to use and disclose the documents without constraint. A more justifiable case for immediate appeal cannot be imagined. The modification order allowing Bagley to comply with the Subcommittee's subpoena was clearly separable from and collateral to IBP's breach-of-duty and conspiracy-to-defame suit; and the Eighth Circuit, in allowing mandamus, necessarily agreed that serious and unsettled questions requiring immediate appellate review were presented. In this context, there was no need to strain the limits of mandamus as an appellate vehicle, and "collateral order" appeal was the appropriate method.

[4] If the documents had been subpoenaed directly from IBP, IBP could have demanded a definition of the subject matter and scope of the Subcommittee's investigation, objected to producing documents not pertinent to the investigation or otherwise privileged, and refused to comply if the Subcommittee declined to recognize IBP's objections. The Subcommittee then would have had to obtain a resolution from the full House to request the Department of Justice to prosecute IBP for contempt of Congress under 2 U.S.C. §192, IBP's pertinenecy and privilege objections could have been litigated before a federal district court in the contempt-of-Congress trial, and any conviction for contempt could have been appealed as a final judgment. *Watkins* v. *United States,* 354 U.S. 178 (1957).

B. The Eighth Circuit Sanctioned Procedures Which Violate Due Process.

Even more serious than the Eighth Circuit's questionable use of mandamus as a substitute for appeal is the way that jurisdictional concept was used to avoid the difficult *substantive* question of appropriate relief for IBP. Having agreed with two district judges that the IBP documents were entitled to judicial protection, the Eighth Circuit nevertheless effectively denied that protection by holding that since the Subcommittee was not a formal party and had not violated the 10-day stay provision in Rule 62(a), there was no basis for relief. The Court of Appeal's admittedly *ad hoc* jurisdictional decision sanctioned a serious departure from due process and decided important questions concerning separation of powers and the integrity of judicial protective orders which should be reviewed by this Court.

If Chief Judge McManus' modification order was final and immediately appealable as a "collateral order", it is clear that the Subcommittee's seizure of the documents during the 10-day automatic stay period violated a federal court protective order. The consequences, involving the delicate separation-of-powers question of the power and means of enforcing a protective order against a congressional subcommittee which is not technically a party to the case, are of obvious importance to the integrity of the judicial process.

But even if the modification order was not a final, appealable order and there was no technical violation of an existing protective order, the Eighth Circuit's ruling that it was powerless to grant any relief to protect the privilege which would otherwise be destroyed is tantamount to ruling that the All Writs Statute is not sufficiently broad to give the courts power to protect the integrity

of their procedures. Judge Taylor in Dallas did not hesitate to rule that Congress was not entitled to interfere with the litigation process and the Fifth Circuit recognized that "[i]f Congress as a whole has created a privilege, then it is the duty of the court to protect it against violation even by a committee of that Congress" (App. B-8); but the Eighth Circuit instead deferred on a technicality which rewards the Subcommittee's devious tactics and ignores this Court's admonition that the power conferred by the All Writs Statute extends "to persons who though not parties to the original action or engaged in wrongdoing are in a position to frustrate the implementation of a court order or the proper administration of justice * * *." *United States* v. *New York Telephone Co.*, *supra*, 434 U.S. at 174.

Whether or not the seizure violated an existing order, the question whether congressional subcommittees are entitled to monitor and scavenge litigation discovery without respecting judicial protective orders and the privileges they insure is an important constitutional issue which has not been—but should be—settled by this Court. If congressional committees are allowed to subpoena documents covered by a judicial protective order from litigants, without filing a formal intervention under Federal Civil Rule 24 and subjecting themselves to judicial control over the circumstances under which access can be obtained, the liberal discovery rules will be endangered and congressional subpoena procedures subverted. Due process demands no less than that IBP be afforded a procedure, somewhere, to assert its privilege claims, but the Eighth Circuit's decision frustrates that right. Indeed, as the Eighth Circuit itself recognized (App. A-29), the breach of the protective order permitted below

threatens to moot IBP's prayer for injunctive relief in the *Gorman* case preventing further disclosure and compelling return of the documents to IBP.

C. The Fifth and Eighth Circuits Conflict on the Subcommittee's Need for Congressional Authorization.

The Fifth Circuit and Eighth Circuit are also seriously at odds on the Subcommittee's need for full House authorization before undertaking court proceedings to enforce or effectuate its subpoenas. The Fifth Circuit required the Subcommittee to show that it was speaking for Congress before requiring sensitive constitutional issues to be decided by the federal courts. The Eighth Circuit, in contrast, allowed the Subcommittee to enforce its subpoena without intervening by using its subpoena leverage to force Bagley to ask for modification of the protective order. Since it had the documents, the Subcommittee deigned to make a so-called "special appearance" in the Eighth Circuit, although there is no provision for such a maneuver in any federal rule, and argued against IBP's contentions, but persisted in denying that it had to respect any court order. The Eighth Circuit allowed it to do so in the name of Congress without any proof that the Subcommittee Chairman was speaking for anyone except himself.

This Court must review the Eighth Circuit's tolerance of the manipulation of civil litigants and Court procedures by a congressional subcommittee which has not demonstrated that the full House has authorized and endorsed the questionable conduct of the Subcommittee undertaken to enforce its subpoena.

CONCLUSION

The procedures used by congressional subcommittees seeking protected materials produced in the course of litigation raise important issues concerning the congressional subpoena process, separation-of-powers, and the power of the courts to protect litigants from the consequences of liberal discovery. The Eighth Circuit tried to avoid these difficult issues by procedural legerdemain which conflicts with the holdings of this Court and the Fifth and Seventh Circuits on the scope of the "collateral order" doctrine of appealability; and its denial of relief emasculates the power of the courts under the All Writs Statute to preserve the integrity of the discovery rules against interference by non-parties. Finally, the Eighth Circuit sanctions a procedure which not only conflicts with the discovery rules, but permits a congressional subcommittee to obtain admittedly privileged materials without affording the party most interested an opportunity to challenge the subpoena and raise the privilege issue.

Since each of the criteria specified by this Court's Rule 19(b) is fulfilled in this case, a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eighth Circuit that, although it was clear error to modify the protective order, the courts are powerless to rectify the resulting breach of privilege.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IOWA BEEF PROCESSORS, INC.,
Plaintiff,

vs.

PATRICK E. GORMAN, HARRY R. POOLE, and SAM TALARICO, as representatives of the members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; and HANS AARSEN,
Defendants.

No. C 77-4040

ORDER

(Filed Feb 13 1978)

The matter before the court is the latest imbroglio of the parties.[1] Pending motions are:

(1) Defendant John A. Cochrane's resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

[1] The court has examined the transcript of the hearing before the Judicial Panel on Multidistrict Litigation (September 30, 1977) wherein Judge Weinfeld described this litigation as "a donnybrook . . . [and] a case of crimination and recrimination charges and counter-charges, and carrying with it the usual bitterness . . . [where] almost every question that is put to a witness would draw an objection". The record to date appears to support this assessment.

(2) Defendant Lex Hawkins' resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

(3) Defendant Albert J. Krieger's resisted motion to dismiss filed August 15, 1977. Denied.

(4) Plaintiff's resisted motion to enjoin a separate action filed in the United States Court for the Southern District of Iowa filed August 15, 1977. Denied.

(5) Defendants Hawkins and Cochrane's resisted motions to dismiss and for a protective order, both filed August 30, 1977. Denied.

(6) Defendants Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Union), Patrick E. Gorman, Harry R. Poole, and Sam Talarico's resisted motion to dismiss filed September 6, 1977. Denied.

(7) Plaintiff's resisted motion to compel production of documents filed September 8, 1977. Granted.

(8) Defendant Irving Stern's resisted motion to dismiss filed September 26, 1977. Denied.

(9 Plaintiff's resisted motions for summary judgment, for a protective order and to compel discovery, all filed October 28, 1977. Granted and denied in part.

(10) Defendants Hawkins and Cochrane's resisted motion to compel answers to deposition questions filed December 13, 1977. Granted and denied in part.

In this diversity action plaintiff seeks damages and injunctive relief against defendants for their role in the alleged malicious inducement to breach and breach of a settlement agreement between plaintiff and defendant Hughes A. Bagley [Bagley], plaintiff's former Vice-President.[2] Plaintiff claims that Bagley met with the de-

[2] The settlement agreement, summarized, compromised Bagley's compensation claims under his employment contract and released IBP from latent suits by Bagley in return for a release of Bagley from a covenant not to compete contained in his employment contract and a release of any cause of action IBP may have had to the time of the settlement agreement.

fendants several times and provided copies of plaintiff's documents, secured with the help of defendant Aarsen, to the defendant attorneys for the purpose of aiding antitrust litigation pending against plaintiff in Texas, (M.D.L. No. 248). Plaintiff alleges that the conduct by Bagley violates both the terms of his settlement agreement and his fiduciary duty to the company and that it was knowingly and maliciously induced by various defendants who conspired to use the inside information to cause damage to IBP's business.

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Plaintiff originally brought this suit against *inter alia* the Union as an entity. Defendants Hawkins and Cochrane originally sought to dismiss for lack of diversity averring that the Union had many members of Nebraska citizenship, the citizenship of plaintiff. Plaintiff then amended its complaint to drop Amalgamated and add its three top offi-

[2] (Continued)

Paragraph 3.2 of the covenant bound Bagley to refrain from assisting third-party litigation against IBP, stating:

> 3.2. BAGLEY, for himself and heirs, legal representatives and assigns, covenants with IBP to forever refrain from aiding, abetting or in any way assisting any third person not a party to this agreement in the bringing of any action or the prosecution of any claim or demand of whatever kind or nature against IBP for any matter, fact, circumstances, happening or thing whatsoever occurring or failing to occur from the beginning of the world to the day of the date of these presents. BAGLEY hereby agrees that any breach of this covenant by him would not be adequately compensable in damages and agrees that, in the event of any breach by him of said covenant, IBP shall, in addition to any claim for damages for breach of covenant to which it may be entitled, be authorized and entitled to seek and obtain equitable relief by way of injunction or otherwise in a court of competent jurisdiction.

cers as representatives of the union and its members. The purpose of the amendment as stated in plaintiff's brief was to "utilize . . . the procedure provided in Rule 23.2 of the Federal Rules of Civil Procedure added in 1966 to avoid the absurdities created by the ancient doctrine that a labor union takes the citizenship of its members. . . ."[3]

Defendants Hawkins, Cochrane, Stern, Gorman, Poole and Talarico moved to dismiss, again on the basis of lack of subject matter jurisdiction. Defendants contend that Rule 23.2 FRCP is not a class action rule and that the citizenship of all union members is still the relevant determinant of diversity.

The question here is whether Rule 23.2 establishes a class action with respect to unincorporated organizations thereby making the citizenship of the representatives of the class, together with the citizenship of plaintiff, solely determinant of diversity. If the rule is a class action rule, jurisdiction is established since plaintiff and the representative parties are of diverse citizenship. If the rule is not a class action rule the court lacks jurisdiction since it is undisputed that some members of the Union are of the same citizenship as plaintiff.

The rule states:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Wright & Miller and Moore agree that this rule provides a mechanism for class action treatment of unincorporated

[3] IBP's Opposition to the Hawkins and Cochrane Motion to Dismiss, filed August 1, 1977, at 5.

associations.[4] It is argued, however, that some courts have disagreed and held that the rule is merely a capacity-to-sue-or-be-sued provision to give entity treatment to an association.[5] The Advisory Committee's Note to Rule 23.2 lends support to this latter interpretation.[6]

An examination of the rule itself and the writings of the commentators leads this court to conclude that Rule 23.2 FRCP is a class action provision and that plaintiff may assert its claim against the union as a class. The rule itself incorporates by express reference portions of Rule

[4] *See* 7A Wright & Miller, Federal Practice and Procedure: Civil §1861 (1972); 3B Moore, Federal Practice, ¶23.2.02 (2d ed. 1977).

[5] *See Lee* v. *Navarro Savings Ass'n,* 416 F.Supp. 1186, 1190 (N.D. Texas 1976); *Suchem, Inc.* v. *Central Aguirre Sugar Co.,* 52 FRD 348, 351 (D. Puerto Rico 1971). *Lee* and *Suchem* are distinguishable, however, because neither court found that unincorporated associations did have entity status in Texas and Puerto Rico and therefore Rule 23.2 was not available. The Iowa rule, applicable by operation of Rule 17(b) FRCP, holds that unincorporated associations *do not* have entity status and cannot sue or be sued directly in the absence of waiver or estoppel. *See Boyer* v. *Iowa High School Athletic Ass'n,* 138 NW2d 914, 915 (Iowa 1965). The language of *Wilson & Co.* v. *United Packinghouse Wkrs. of America,* 181 F.Supp. 809, at 817 (N.D. Ia. 1960) and *Coughlon* v. *Iowa High School Athletic Ass'n,* 150 NW2d 660, at 662 (Iowa 1967) put in context here, is not otherwise. Finding that Rule 23.2 is available, the issue before the court here was never addressed by *Lee* nor was it properly before the court in *Suchem.*

[6] The Advisory Committee's Note states:

> Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b)

39 FRD 108 (1966).

23 FRCP.[7] The requirements of numerosity, commonality and typicality contained in Rule 23 may be subsumed implicitly into Rule 23.2.[8] In any event they are present here. This is in fact a bona fide unincorporated association and there is no suggestion that Rule 23.2 was utilized to evade the constraints on the court's jurisdiction.[9] *See* 7A Wright & Miller, Federal Practice and Procedure: Civil §1861, at 461 (1972). Accordingly, this action is maintainable as a class action; the citizenship of the representative defendants and plaintiff are diverse; motion to dismiss for lack of subject matter jurisdiction denied. *See generally Patrician Towers Owners, Inc.* v. *Fairchild,* 513 F.2d 216, 220 (4th Cir. 1975); *Management Television Systems, Inc.* v. *National Football League,* supra.

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted

Defendants Hawkins, Cochrane, Krieger and Stern next move to dismiss for failure to state a claim for which relief

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[7] Defendants point out that the provisions for notice and pleading present in Rule 23 are absent from Rule 23.2. This absence may be explained by the fact that the problems of defining the class and giving notice to the class that plague Rule 23 class actions are minimized in the context of an unincorporated association where the class is fairly defined and notice easily obtained.

[8] *See Merkey* v. *Board of Regents of State of Florida,* 344 F.Supp. 1296, 1303 (N.D. Fla. 1972) *vacated on other grounds* 493 F.2d 790 (5th Cir. 1973). *But see Management Television Systems, Inc.* v. *National Football League,* 52 FRD 162, 164 (E.D. Pa. 1971). 7A Wright & Miller, *supra;* 3B Moore, *supra.*

[9] As defendants point out in Reply Brief filed October 7, 1977, at 8:

> It is well-settled that . . . [diversity] jurisdiction is available . . . in a traditional class action under Rule 23 where only the citizenship of class representatives is considered in determining whether diversity exists. *See Montgomery Ward & Co.* v. *Longer,* 168 F.2d 182 (8th Cir. 1948).

can be granted. All complain of a lack of specificity and factual allegations—in the case of defendants Cochrane and Hawkins, as to the allegations in the complaint of breach of fiduciary duty and conspiracy; in the case of defendant Krieger, as to the allegations in the complaint of inducing breach of contract; in the case of defendant Stern, as to all of the above.

The standard for a motion to dismiss is that such a motion cannot be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Cruz* v. *Beto,* 405 U.S. 319, 322 (1972). In this light defendants' motions fail and are denied.

Motion to Enjoin Prosecution of Separate Action in Lieu of Compulsory Counterclaim

Plaintiff sought, by this motion, to prevent defendants Hawkins and Cochrane from pursuing an abuse of process action in the United States District Court for the Southern District of Iowa. However, since that action was dismissed by Judge Stuart on November 17, 1977, this motion is denied as moot.

Motions for Protective Order and Motions to Compel

A number of motions for protective orders and corresponding motions to compel have been filed in this action. In some instances the granting of one motion requires the denial of another. In each of these instances that result will be indicated.

The first motions for protective orders were filed by defendants Cochrane and Hawkins on July 22, 1977. They were unaccompanied by an affidavit of good faith attempts at resolution by alternate means and the movants were notified that no further action would be taken until Rule 16E of the Local Rules was complied with. Cochrane and Hawkins filed essentially the same motion for protective order, with affidavit, on August 30, 1977. The substance of

the motion sought protection for documents subject to discovery requests in the antitrust suit M.D.L. No. 248 until such time as the documents are discoverable there. The motion also sought to protect documents alleged to be protected by the attorney-client privilege and work-product immunity. Finally, incorporating by reference a response to a request for production of documents, the defendants refused to produce requested documents so long as their motions to dismiss remained outstanding. Plaintiff's response was to move to compel production of those documents contained in its first request.

The overriding rationale applied with respect to all discovery motions is that discovery provisions are to be broadly and liberally construed. *Hickman* v. *Taylor,* 329 U.S. 495, 507 (1947); *accord Schlagenhauf* v. *Holder,* 379 U.S. 104, 114-15 (1964). Taking defendants' last claim first, it is clear that this matter has been resolved by the court's ruling today. As to the claim that the documents are protected by work-product immunity and attorney-client privilege the court concludes that a blanket invocation of these doctrines to bar discovery is inappropriate. In this case, where state law supplies the rule of decision, Rule 501 FREv, the burden of establishing attorney-client privilege is on the defendants. *Bailey* v. *Chicago, Burlington & Quincy Railroad Co.,* 179 NW2d 560, 564 (Iowa 1970). That burden cannot be met by resort to a privilege incantation. The assertion must be document-specific with a sufficient articulation of the underlying circumstances and general substance, and identification of the parties involved, to establish a prima facie showing of privilege. This standard applies to the assertion of work-product immunity as well. In this instance defendants have not borne this burden.

The claim that defendants are protected from discovery requests pending in MDL No. 248 until the documents are allowed to be discovered in that action cannot be accepted. The effect of an assent to this idea would subordinate this action and ancillary discovery matters to another case filed in another district court. Discovery here cannot be predicated on what that court will do. However, this does not mean that the court is insensitive to the potential for interference with the conduct of orderly discovery in MDL No. 248. All parties have indicated that a voluminous amount of materials are subject to requests for discovery here. Bearing this in mind, together with the potential for interference with MDL No. 248, the court orders defendants Hawkins and Cochrane to comply with plaintiff's first request for production of documents[10] by producing the documents in the usual manner or by affording plaintiff a reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries at the place where the records are kept or at any other mutually agreed-upon place. *Cf.* Rule 33(c) FRCP. In the event discovery of the materials in this fashion results in undue interference with MDL No. 248 suitable protection may be obtained from this court on a *particularized* showing.

Plaintiff moved for a protective order on October 28, 1977, prohibiting defendants' inquiry into matters allegedly protected by attorney-client privilege, prohibiting inquiry into purported illegal acts by plaintiff, and restricting use of IBP business information to defense counsel for purposes of this case and to Cochrane and Hawkins for the purposes of MDL No. 248. The court grants the protective order limiting the usage of IBP's confidential business information and denies the motion regarding the claim of attorney-client privilege and the claim of the irrelevance of illegal acts.

Plaintiff falls prey to the same lack of specificity that defendants Hawkins and Cochrane do regarding a claim of attorney-client privilege. A mere recitation of the privilege litany is insufficient. The standards applicable to meeting the burden of establishing a privilege set out above

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[10] The court notes that defendants maintain that they have no documents falling within Specification No. 6 of plaintiff's first request for production of documents. On this representation defendants need not comply.

apply here. Plaintiff cannot meet that burden by requesting protection from inquiry into "matters protected by IBP's attorney-client privilege".

The court also rejects the claim that illegal acts by IBP are irrelevant to the case. The claim that the covenant between IBP and Bagley was intended to conceal illegal acts is central to defendants' case. A relevance objection is unavailing in this context.[11]

Defendants Cochran and Hawkins filed a motion to compel answers to questions propounded during an oral deposition of William L. Heubaum, corporate counsel for IBP. The court has examined the questions and the context in which they were asked. It seems apparent that work-product immunity or the attorney-client privilege is applicable to the information sought.[12] Defendants, however, seek to overcome the immunity or privilege by invoking the improper purpose exception.[13] Defendants' burden in this respect is heavy—they must make a *prima facie*

[11] Plaintiff would have the court determine in the guise of a protective order, in addition to its motion for summary judgment discussed *infra,* that the Bagley covenant does not offend public policy. The court is not willing to make that determination at this stage of the litigation.

[12] This is *not* true as to all information sought. For example, counsel for IBP claimed attorney-client privilege as to the *number* and *bulk* of file drawers regarding antitrust at Heubaum's office (Heubaum deposition, Volume I at 146-147) and as to *whether* certain documents, oftentimes the contents of which were disclosed, were sent to IBP's attorneys (Heubaum deposition, Volume I at 155, 210-213). This information is clearly not privileged.

[13] Defendants also invoke the general rule that privilege does not lie when business, as opposed to legal, counsel is sought. Though it may be true that a corporation cannot merely utilize general counsel as a conduit to protect all its documents and other information it is also true that defendants have not shown in even the slightest degree that this activity has occurred here. Merely noting that Heubaum serves Iowa Beef as Secretary and Vice-President as well as general counsel is insufficient.

showing that the information sought was transmitted in furtherance of a crime or tort. *Pfizer, Inc.* v. *Lord,* 456 F.2d 545, 549 (8th Cir. 1972). *See In re Murphy,* 560 F.2d 326, 338 (8th Cir. 1977). Defendants assert that "[t]he testimony in the present case . . . establishes conclusively the existence of antitrust violations by IBP". This assertion is exaggerated. In any event defendants must make a *prima facie* showing that the communication was pursuant to the crime or tort. *See In re Murphy, supra.* No such showing has been made. Except as noted herein, the motion to compel answers is denied.

Plaintiff moved to compel defendant Bagley to answer deposition questions which he has refused to answer on grounds of attorney-client privilege. An examination of the questions reveals that the information sought would be privileged. Plaintiff maintains, however, that the privilege was waived by Bagley's answer, paragraph 10, which allegedly injects a state-of-mind issue into the case. That paragraph states in part:

> It is affirmatively alleged that paragraph 3.2 of the Settlement Agreement was obtained by fraud and misrepresentation on the part of IBP.

Since this response does inject the question of reliance on IBP's statements or acts[14] Bagley cannot now prevent inquiry directed to that issue. This information is vital to plaintiff to meet Bagley's affirmative defense of fraud and misrepresentation. *See Haymes* v. *Smith,* 73 FRD 572, 577 (W.D.N.Y. 1976); *Hearn* v. *Rhay,* 68 FRD 574, 581 (E.D. Wash. 1975). Defendant Bagley is directed to answer questions relevant to the question of reliance; the attorney-client privilege is waived.

Motion For Summary Judgment

IBP moves for summary judgment against Bagley on the question of liability for breach of the settlement agreement

[14] See 37 Am. Jur. 2d, Fraud and Deceit §223 *et seq; cf.* W. Prosser, Torts, 714 *et seq* (4th ed. 1971).

with IBP and for violation of the fiduciary duty allegedly owed by IBP.

IBP has a particularly heavy burden of persuasion—the movant must show that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. Rule 56(c) FRCP; *see Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). The court is required to view the facts in the light most favorable to the party opposing the motion and to give to that party the benefit of all reasonable inferences to be drawn from the facts. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The court cannot say, at this point in the litigation, that there is no genuine issue of material fact. Furthermore, though IBP attempts to de-emphasize the importance of the motion by carefully limiting it to Bagley, the preclusive effect of the ruling, if only from a reasoning standpoint, is apparent. The court considers it inappropriate at this time to resolve this issue and therefore a major portion of the lawsuit. Further discovery and a vigorous analysis of the relevant legal principles might make summary judgment feasible in the future.

It is therefore
ORDERED

1. Motions 1-6 inclusive and 8 above are denied.
2. Motion 7 is granted.
3. Motions 9 and 10 granted and denied in part.

February 10, 1978.

EDWARD J. MCMANUS, *Chief Judge*
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IOWA BEEF PROCESSORS, INC.,

Plaintiff,

vs.

PATRICK E. GORMAN, HARRY R. POOLE, and SAM TALARICO, as representatives of the members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; and HANS AARSEN.

Defendants.

NO. C 77-4040

ORDER

This matter is before the court on Iowa Beef Processors, Inc.'s unresisted motion to have certain documents filed under seal with the court, filed October 13, 1978 and defendant Hughes A. Bagley's resisted motion to lift protective order or in the alternative for guidelines, filed November 1, 1978.

The thrust of the motions involve an attempt by the Small Business Subcommittee on SBA and SBIC authority and General Small Business Problems of the House of Representatives (Committee) to secure access to certain documents produced by defendant Bagley pursuant to plaintiff's first request for documents and which are presently under a protective order issued by this court.

Specifically, on February 13, 1978 this court granted IBP's motion for protective order restricting the use of Bagley's discovery material to counsel in this case for the purposes of this case and the Beef Industry Antitrust Litigation now pending in Dallas, Texas. The basis on which the protective order was originally issued was that

the documents contained confidential information concerning IBP's business practices, etc. which would be detrimental to IBP's business if given to competitors.

From a review of the record it is the view of the court that the protective order should be modified as to the documents requested. The court can ascertain no great interference with its ability to proceed in this suit if the committee is allowed access to the records and the right to copy them as long as the originals still remain accessible to the parties to prosecute this action. IBP is free to approach the committee as to the scope of the use of the documents.

It is therefore
ORDERED

This court's protective order is modified to allow defendant Hughes A. Bagley to comply with the committee subpoena served upon him in this action.

November 22, 1978.

EDWARD J. MCMANUS, *Chief Judge*
United States District Court

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IOWA BEEF PROCESSORS, INC.,
Plaintiff-Appellant,

v.

HUGHES A. BAGLEY,
Defendant-Appellee.

No. 78-1855

Appeal from United States District Court
for the Northern District of Iowa,
Western Division.
Chief Judge EDWARD J. MCMANUS, *Presiding.*

ORDER

This case having come before the undersigned upon application of Plaintiff-Appellant, Iowa Beef Processors, Inc. (IBP) for suitable orders preserving appellate jurisdiction of this Court and for a stay pending appeal of the Order of the United States District Court for the Northern District of Iowa modifying a protective order covering certain documents procured and sought to be procured from one Bagley by the Committee on Small Business of the United States House of Representatives; and the Appellant having appeared by its attorney, Edward W. Rothe, and Special Counsel John Fitzgibbons having specially appeared for the House Committee;

And it appearing that the questions raised by the pleadings may directly or indirectly call into question both the power of the Congress to conduct unimpeded lawful pursuit of its investigative functions and authority of the Court to protect its litigation processes;

And it appearing that the Honorable Neal Smith, Chairman of the Committee, in recognition of the nature of the

problems involved, has agreed that no portion of the materials which have heretofore come into possession of the Committee as a result of service of its subpoena dated October 30, 1978, and directed to Hughes A. Bagley of Sioux City, Iowa, will be disclosed publicly or privately or otherwise used prior to December 16, 1978, in order that the parties may present and the Court may consider in an orderly way the question presented; now therefore,

IT IS ORDERED that the order signed by Chief Judge McManus of the United States District Court for the Northern District of Iowa on November 22, 1978, and filed on November 24, 1978, modifying the protective order granted to IBP on February 13, 1978, to permit Hughes Bagley to respond to a purported subpoena from the Small Business Committee of the United States House of Representatives is hereby stayed temporarily until, and including, December 16, 1978; and,

IT IS FURTHER ORDERED that pursuant to Chairman Smith's agreement hereinabove mentioned, the Committee Staff and others acting in concert with them shall take no action with respect to the materials, the subject of this order, other than to protect them from scrutiny and disclosure during the effective life of this order.

DATED this 4th day of December, 1978.

J. Smith Henley,
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1855

IOWA BEEF PROCESSORS, INC.,

Appellant,

v.

HUGHES A. BAGLEY,

Appellee.

Appeal from United States District Court
for the Northern District of Iowa.

Submitted: December 12, 1978

Filed: December 14, 1978

Before Bright, Henley and McMillian, Circuit Judges.
Per Curiam.

This case comes before the court on motion of Iowa Beef Processors, Inc. (IBP) for a stay pending appeal and for other suitable orders in the nature of extraordinary writs which would preserve appellate jurisdiction. We deny the stay and decline to issue such orders.

This case is the most recent manifestation of a lengthy, and increasingly acrimonious, course of litigation involving IBP. IBP has been the subject of numerous private antitrust suits in recent years. Several of these lawsuits have been brought by members of a group calling themselves the Meat Price Investigators Association and have been pursued by two lawyers, Lex Hawkins and John Cochrane. The Judicial Panel on Multidistrict Litigation transferred a number of these private antitrust cases to the United States District Court for the Northern District of Texas for consolidated pretrial proceedings. *See In Re Beef Industry Antitrust Litigation,* 432 F.Supp. 211 (Jud. Pan. Mult. Lit. 1977); *In Re Beef Industry Antitrust Litigation,* 419 F.Supp. 720 (Jud. Pan. Mult. Lit. 1976). As part of the discovery proceedings in these Texas cases,

the district court entered a protective order prohibiting attorneys Cochrane and Hawkins, among others, from disclosing the contents of documents obtained through discovery on the defendants, including IBP. It appears that some of these documents are the same as the documents in question in this case.

The instant litigation was begun by IBP in the Northern District of Iowa on August 1, 1977. IBP sued a number of defendants including Hawkins, Cochrane, and one Hughes A Bagley, a former vice president of IBP. IBP's complaint alleged that Bagley had taken a number of documents with him when he left IBP's employ in 1975 and that these documents contained confidential business information which would damage IBP's business if they were disclosed. The complaint further alleged that Bagley had disclosed certain confidential information and records to Hawkins, Cochrane, and others in violation of various contractual obligations and common law fiduciary duties. The case was referred to the docket of Chief Judge McManus who on February 13, 1978 issued an order deciding a number of pretrial motions. The order granted IBP's motion for a protective order preventing disclosure of IBP's confidential business information and limiting its use to defense counsel and to Hawkins and Cochrane for the purposes of the consolidated Texas cases.

Over a period of time, it appears that the House Subcommittee on SBA and SBIC Authority and General Small Business Problems (the Subcommittee) of the House Committee on Small Business has become interested in alleged price-fixing or other antitrust violations in the meat industry. In that connection, the Subcommittee served Hawkins and Cochrane with congressional subpoenas duces tecum compelling them to produce a number of documents, including some which were subject to the protective order issued in connection with the consolidated Texas cases. Hawkins and Cochrane moved to dissolve the protective order. The motion was denied by United States District

Judge William M. Taylor, who held that the Subcommittee's attempt to subpoena the documents covered by the protective order violated the due process clause. *In Re Beef Industry Antitrust Litigation,* 1978-2 Trade Cases ¶ 62, 189 (N.D. Tex. August 17, 1978). Judge Taylor's decision is currently on appeal to the Fifth Circuit.

Frustrated to this point in its efforts to obtain this material in the Texas proceedings, the Subcommittee changed tactics. In late October, 1978 it served a similar subpoena duces tecum on Bagley, requiring him to produce a number of documents covered by Judge McManus' protective order. Bagley moved to dissolve the protective order and IBP opposed the motion. By order filed November 24, 1978 Judge McManus granted Bagley's motion and lifted the protective order to the extent necessary to allow Bagley to comply with the subpoena.

John M. Fitzgibbons, Special Counsel to the Subcommittee, was apprised of Judge McManus' order in a telephone conversation the same day. On November 27 a Subcommittee investigator, Nick Wultich, appeared at the offices of Bagley's counsel and took physical possession of seven boxes of documents.

IBP's counsel learned of the order on November 28, and subsequently learned that the Subcommittee had acquired the documents. On November 30 IBP filed a notice of appeal from the order lifting the protective order. On December 4 IBP filed this motion for a stay and other appropriate relief. By order dated December 4 Judge Henley stayed the district court order pending a hearing before a panel of the court and recited an agreement whereby the Subcommittee and its staff would take no action with respect to the documents until, and including, December 16. The matter came on for a hearing before this panel on December 12.

Having carefully considered the papers and oral arguments submitted by IBP and the Subcommittee, whose Special Counsel appeared specially, we are of the opinion

that a stay of the district court order is both inappropriate and unnecessary at this time.

We begin by noting the very limited scope of Judge McManus' order. The protective order of February 13 remains in effect as to all other parties to the litigation and as to any disclosure by Bagley other than as necessary to comply with the subpoena.

In regard to the disclosure to the Subcommittee, it has represented in its papers filed in this court and during oral argument that it has no intention of making public any of these documents, if ever, until after the House of Representatives begins its next session in January, 1979. In good faith, we must accept these representations made by members of a coordinate branch of government at face value. We are further assured that the Subcommittee and its Special Counsel will take all appropriate precautions to insure that these documents are disclosed only to the extent necessary to allow the Subcommittee staff to begin the job of collating and classifying the information contained therein. In present circumstances any disclosure beyond the immediate needs of the Subcommittee and its staff would appear to be both unnecessary and a matter of grave import for all concerned.

Given the Subcommittee's representations to us and the limited nature of Judge McManus' order, we are of the opinion that granting a stay and compelling the return of the documents at this time is both unnecessary as a practical matter and inappropriate as a matter of comity. Such action would inevitably, albeit erroneously, be viewed as an expression of our lack of faith in the Subcommittee's representations to us. Such an expression would be particularly inappropriate in view of the Subcommittee's past cooperation with this court.

We are aware that this case presents serious jurisdictional and substantive questions and implicates fundamental concepts of legislative and judicial authority. Accordingly, we deem it appropriate that the case be heard

on an expedited basis. The case will be scheduled for argument on the merits on January 9, 1979, and the Clerk is directed to work out an appropriate briefing schedule with the parties.

The motion for a stay pending appeal and for other appropriate relief is denied.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1855

IOWA BEEF PROCESSORS, INC.,

Appellant,

v.

HUGHES A. BAGLEY,

Appellee.

Appeal from United States District Court
for the Northern District of Iowa.

Submitted: January 9, 1979

Filed: February 7, 1979

Before BRIGHT, HENLEY and MCMILLIAN, Circuit Judges.

HENLEY, Circuit Judge.

Iowa Beef Processors, Inc. (IBP) appeals from the district court order which partially lifted a protective order entered in the course of discovery proceedings in this diversity suit. Treating the notice of appeal as a petition for a writ of mandamus, we grant the writ, vacate the district court's order, and remand the case with directions to reinstate, in full, the protective order.

I.

IBP, which is described in the briefs as the world's largest meat packing concern, has been the target of numerous private antitrust suits in recent years. Many of these lawsuits have been brought by members of an organization calling itself the Meat Price Investigators Association and have been pursued by two lawyers, Lex Hawkins and John Cochrane. A number of these cases have been transferred to the United States District Court of the Northern District of Texas for consolidated pretrial proceedings. *See In re Beef Industry Antitrust Litigation,* 432 F.Supp. 211 (Jud. Pan. Mult. Lit. 1977); *In re Beef Industry Antitrust Litigation,* 419 F.Supp. 720 (Jud. Pan. Mult. Lit. 1976). This antitrust litigation has, in turn, generated a massive amount of collateral litigation.

The instant case was begun by IBP in the Northern District of Iowa on August 1, 1977. IBP sued a number of defendants including Hawkins, Cochrane, and one Hughes A. Bagley, a former vice president of IBP. In its complaint, IBP alleged that Bagley had taken a number of documents with him when he left IBP's employ in 1975 and that these documents contained confidential business information which, if disclosed, would damage IBP's business. IBP further alleged that Bagley had disclosed certain confidential information and records to Hawkins, Cochrane, and others in violation of various contractual obligations and common law fiduciary duties. The case came before Chief Judge McManus who on February 13, 1978 issued an order deciding a number of pretrial motions. In part, the order granted IBP's motion for a protective order preventing disclosure of IBP's confidential business information and limiting its use to defense counsel in the Iowa case and to Hawkins and Cochrane in connection with Texas antitrust cases.

Over a period of time, the House Subcommittee on SBA and SBIC Authority and General Small Business Problems (the Subcommittee) of the House Committee on Small Business has become interested in pricing practices in the meat industry. In that connection, the Subcommittee served Hawkins and one Glen L. Freie with congressional subpoenas duces tecum compelling them to produce a number of documents, including some which were subject to a protective order issued in connection with the Texas antitrust cases.[1] Hawkins and Freie moved

[1] In addition to the two subpoenas served by the Subcommittee on SBA and SBIC Authority and General Small Business Problems, two subpoenas were served by the Subcommittee on Oversight and Investigation of the Interstate and Foreign Commerce Committee of the House of Representatives. The latter subcommittee is not involved in the instant case.

to dissolve the protective order. Their motion was denied by United States District Judge William M. Taylor, who held that the Subcommittee's attempt to subpoena the documents covered by the protective order violated the due process clause. *In Re Beef Industry Antitrust Litigation,* 457 F. Supp. 210 (N.D. Tex. 1978). An appeal from that decision was recently dismissed by the Fifth Circuit, *Neal Smith, et al.* v. *The National Provisioner, et al.,* No. 78-3344 (5th Cir. February 2, 1979).

Frustrated in its efforts to obtain this material in the Texas proceedings, the Subcommittee changed tactics. In late October, 1978 it served a similar subpoena duces tecum on Bagley, requiring him to produce a number of documents covered by Judge McManus' February 13 protective order. Bagley moved to dissolve the protective order and IBP opposed the motion. By order filed November 24, 1978 the district court granted Bagley's motion and partially lifted the protective order to the extent necessary to allow Bagley to comply with the subpoena. It is from this order that IBP appeals.

In a telephone conversation John M. Fitzgibbons, Special Counsel to the Subcommittee, was apprised of the district court's order the day it was entered. On November 27 a Subcommittee investigator, Nick Wultich, appeared at the office of Bagley's counsel and took physical possession of seven boxes of documents.

IBP's counsel learned of the order on November 28 and subsequently learned that the Subcommittee had acquired the documents. On November 30 IBP filed a notice of appeal from the order lifting the protective order. On December 4 IBP filed a motion for a stay and other appropriate relief in this court. By order dated December 4 Judge Henley stayed the district court order pending a hearing before a panel of the court and recited an agreement whereby the Subcommittee and its staff would take no action with respect to the documents until, and including, December 16. The matter came on for a hearing before this panel on December 12, and on December 14 we issued an order denying the motion for a stay, but ordering the appeal expedited. *Iowa Beef Processors, Inc.* v. *Hughes A. Bagley,* No. 78-1855 (8th Cir. Dec. 14, 1978).

Despite the strenuous efforts of counsel to persuade us otherwise, we find that the case in its current posture presents a relatively narrow question, *i.e.,* did the district court abuse its discretion in granting Bagley's motion to lift the protective order? Prior to addressing this question, however, we must first examine our jurisdiction.

II.

The district court order partially lifting the protective order is clearly not a "final decision" as that term is used in 28 U.S.C. § 1291, because the order is not "one which ends the litigation . . . and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States,* 324 U.S. 229, 233 (1945). Thus, unless the order falls within a statutory or judicially-created exception to the finality doctrine, appellate review at this time is premature.

The order is not appealable under the Interlocutory Appeals Act, 28 U.S.C. § 1292. The order is not one granting or denying an injunction under § 1292(a)(1) nor did IBP move for certification under § 1292(b).

IBP argues that the order partially lifting the protective order is a "collateral order" within the meaning of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). Most courts, including this one, have held that orders compelling the production of documents or testimony are not appealable as collateral orders or otherwise. *See, e.g., Miller* v. *Reighter,* No. 78-1276 (8th Cir. Sept. 20, 1978); *Gialde* v. *Time, Inc.,* 480 F.2d 1295 (8th Cir. 1973); *Childs* v. *Kaplan,* 467 F.2d 628 (8th Cir. 1972); *Borden Co.* v. *Sylk,* 410 F.2d 843 (3d Cir. 1969); *Paramount Film Distributing Corp.* v. *Civil Center Theatre, Inc.,* 333 F.2d 358 (10th Cir. 1964). We view an order partially lifting a protective order as the functional equivalent of an order compelling production of documents or testimony and find the reasoning of the above-listed cases

to be persuasive in this case. As the court observed in *Borden Co.* v. *Sylk, supra,* 410 F.2d at 845-46:

> We have detected what appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more 'collateral' than 'final' orders.
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> Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept the appellant's view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters.

Accordingly, we hold that we have no appellate jurisdiction. This does not, however, end our consideration of possible bases of jurisdiction.

As an alternative to appellate jurisdiction, IBP contends that this is an appropriate case for us to invoke our discretionary writ-issuing authority under the All Writs Act, 28 U.S.C. § 1651(b),[2] and issue a writ of mandamus compelling reinstatement of the protective order and/or return of the documents.[3]

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[2] The Act provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[3] Although we have occasionally treated a notice of appeal as a petition for a writ of mandamus, *see, e.g., Wilkins* v. *Erickson,* 484 F.2d 969, 971 (8th Cir. 1973), we emphasize that we will not do so as a matter of course in every case where questions about appellate jurisdiction

We begin by noting that the power conferred by the All Writs Act "is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power.' " *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 383 (1953). In addition, invocation of power under the Act must be carefully circumscribed, lest appellate courts find themselves reviewing "nonappealable orders on the mere ground that they may be erroneous." *Will* v. *United States,* 389 U.S. 90, 98 n.6 (1967). Bearing in mind these salutary and well-established restrictions, we nevertheless conclude that this case presents an appropriate occasion for us to invoke our power under the All Writs Act.

First, a number of courts, including this one, have found mandamus to be an appropriate vehicle to review orders compelling the production of documents or testimony claimed to be privileged or covered by other more general interests in secrecy. *See, e.g., Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1978) (en banc) (attorney-client privilege); *Usery* v. *Fitter,* 547 F.2d 528 (10th Cir. 1977) (disclosure of identity of informer in FLSA case); *Breed* v. *United States Dist. Ct.,* 542 F.2d 1114 (9th Cir. 1976) (disclosure of personnel and inmate files of state youth authority); *Pfizer, Inc.* v. *Lord,* 456 F.2d 545 (8th Cir. 1972) (attorney-client privilege); *United States* v. *United States Dist. Co.,* 444 F.2d 651 (6th Cir. 1971), *aff'd,* 407 U.S. 297 (1972) (disclosure to conspiracy defendant of his monitored conversations); *Harper & Row Publishers, Inc.* v. *Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court,* 400 U.S. 348 (1971) (attorney-client privilege); *Hartley Pen Co.* v. *United States Dist. Ct.,* 287 F.2d 324 (9th Cir. 1961) (dis-

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[3] (Continued)

are raised. In cases such as the instant one, however, where the propriety of mandamus was raised from the outset, where the mandamus issue has been fully briefed, and where the interests of the district court have been actively presented, the notice of appeal may properly be treated as a petition for a writ of mandamus.

closure of secret formula acquired under license forbidding disclosure). In this case, IBP claims that the documents disclosed to the Subcommittee are covered by the attorney-client privilege and/or constitute trade secrets in the nature of confidential business information.[4]

Second, the unique circumstances in which disclosure of these materials was allowed give rise to serious policy considerations which we deem sufficiently compelling to require immediate appellate attention. The parties have not cited, nor has our research disclosed, any case involving comparable facts. In addition to the uniqueness of the problem, it appears that the Subcommittee is engaged in an ongoing investigation. Because it is not inconceivable that other material generated in connection with this litigation may be sought by the Subcommittee, the questions presented here may well recur prior to any opportunity to review a final judgment.

Having found this case to be appropriate for review by way of mandamus, we turn to the merits of the district court's order.

III.

On February 13, 1978 the district court entered a protective order restricting use of IBP business information to defense counsel in the instant case and to Cochrane and Hawkins for the purposes of the Texas antitrust cases. In so doing, the court implicitly conceded that any

[4] The order of February 13 granted IBP's motion for a protective order only to the extent that the material in question constituted confidential business information. In the same order, the district court rejected IBP's claim of attorney-client privilege. Accordingly, we are concerned solely with the question of allegedly confidential business information.

further disclosure would unduly harm IBP.[5] Yet, on November 24, without any showing that intervening circumstances had in any way obviated the potential prejudice to IBP, the court allowed disclosure of these documents to the Subcommittee without any constraints on the Subcommittee's use thereof.

Even more important than this abrupt and unexplained turnabout is the fact that the documents ordered disclosed to the Subcommittee were an important part of the subject matter of the underlying lawsuit. That is, IBP alleged that Bagley had breached both contractual and fiduciary obligations to IBP by disclosing the contents of these documents and sought an injunction preventing further disclosure and compelling the return to IBP of all such documents. In these circumstances, the district court should have maintained the status quo by carefully limiting disclosure of these documents pending determination of the merits of IBP's claim. The court's order allowing disclosure to the Subcommittee, without any limitation on its use of the documents could well render moot in part IBP's claims for relief in the underlying lawsuit.[6]

On this record, then, we are compelled to conclude that the district court's order partially lifting the protective order was a clear abuse of discretion. Accordingly, we grant the petition for a writ of mandamus, vacate the district court's order of November 24, and remand the case with instructions to reinstate in full the protective order entered February 13.[7]

[5] The party requesting a protective order must initially show that the information sought to be protected is within the scope of Rule 26(c) and that he might be harmed by its disclosure. 8 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2043 at 300-01 (1970).

[6] We, of course, express no opinion as to the merit, if any, of IBP's claims for relief in the underlying lawsuit.

[7] Out of what is, perhaps, an overabundance of caution, we emphasize that this opinion should not be construed as meaning that review by way of mandamus is available whenever a district court compels disclosure of material

We now turn to the Subcommittee and the relief sought against it by IBP. At the outset, it should be noted that the Subcommittee is not a party to the underlying litigation nor a party to this appeal.[8] Nevertheless, IBP requests that we order the Subcommittee to return the documents in question to the district court and to refrain from revealing the contents of those documents.

IBP's argument in this regard is premised on the allegation that the Subcommittee acquired the documents in an unlawful manner. IBP argues that Rule 62(a) of the Federal Rules of Civil Procedure operated automatically to stay the order partially lifting the protective order for a period of ten days and that the Subcommittee's "seizure" of the documents three days after the November 24 order violated the protective order.

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[7] (Continued)
claimed to be protected by privilege or other interest in confidentiality. The rationale for invoking mandamus in such situations is twofold: (1) disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and (2) the disclosure involves questions of substantial importance to the administration of justice. *Cf. Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F.2d at 492. Where the case involves the attorney-client privilege, the importance of the privilege itself may serve to satisfy the second requirement. *Id.* In other cases where the claim of confidentiality is not so intrinsically a part of the administration of justice, some further showing is required. In the instant case, this showing has been made by the unique facts of this case (essentially making the case one of first impression), the possibility that similar disclosure will be sought prior to final judgment, and the fact that the allegedly confidential documents are themselves the subject matter of the underlying lawsuit.

[8] Special Counsel to the Subcommittee, John M. Fitzgibbons, appeared specially to brief and argue the case before this court.

Rule 62(a) provides, in pertinent part:

> Except as stated herein, no execution shall issue *upon a judgment* nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. (Emphasis added.)

The term "judgment" is defined in Rule 54(a), which reads in pertinent part:

> Judgment as used in these rules includes a decree and any order from which an appeal lies.

As we have noted, no appeal lies from the district court's order of November 24 and, accordingly, the automatic ten-day stay provision of Rule 62(a) does not apply in this case. The Subcommittee's action in taking possession of the documents thus was not in violation of the protective order.

Because the Subcommittee has neither been made a party to this litigation nor acted in such a manner as to violate an existing court order, we find no basis on the record now before us to compel the Subcommittee to return the papers it acquired as a result of its subpoena.

IV.

We are aware that this opinion is probably not the final word in this controversy. As we have noted, however, the scope of our inquiry at this stage is severely limited. Any further action in this matter should be pursued in a district court of competent jurisdiction[9] or before the Subcommittee itself.

We are also cognizant of the fact that this dispute has, at least in part, passed into the political arena. Indeed, from the very beginning, it was apparent that non-jurisprudential considerations have played an important part

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[9] At least one court has held that jurisdiction and venue in actions against congressional committees and their members are normally proper in the United States District Court for the District of Columbia. *See Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2d Cir. 1970).

in the parties' litigation strategy. We dare to suggest that those concerned would have been well-advised to have worked out an arrangement among themselves which would take into account the competing interests, rather than attempting to foist upon this court the responsibility for resolving questions which are either beyond the scope of appellate judicial authority or outside the meager record of this case.

V.

The petition for a writ of mandamus is granted, the district court order of November 24, 1978 is vacated, and the case is remanded to the district court with instructions to reinstate in full the protective order entered on February 13, 1978.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Texas
Dallas Division

M.D.L. No. 248
In re: Beef Industry
Antitrust Litigation

MEMORANDUM OPINION

(Filed Aug 17 1978)

On March 16, 1978, two attorneys representing Plaintiffs in this litigation, John Cochrane and Lex Hawkins, and an officer of a Plaintiff, Glenn L. Freie, moved to the Court for leave to comply with Congressional subpoenas.

The four subpoenas were issued by two Congressional subcommittees, the Subcommittee on Oversight and Investigation of the Interstate and Foreign Commerce Committee and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the House Committee on Small Business, both of the House of Representatives of the United States, 95th Congress.

Parts of the materials subpoenaed are covered by a protective order instituted in this proceeding.[1] On March 22, 1978, a hearing was held in this Court in order to determine whether the motion of Messrs. Freie, Hawkins and Cochrane should be granted. At the conclusion of that hearing the Court orally announced its decision to deny the motion, which announcement is appended to this opin-

[1] Parts are also covered by a protective order in the case of *Iowa Beef Processors, Inc.* v. *Gorman, et al,* No. C-77-440 (N.D. Iowa, W.Div.), which, of course, are not of kin in this proceeding.

ion. A formal order to that effect was entered on April 4, 1978.

May 30, 1978, the Subcommittees moved by their counsel and Counsel of the Clerk of the House for leave to file their motion to grant Plaintiff's request for leave to comply or in the alternative for clarification or modification of protective order. Leave to intervene and file the motion was granted the following day, June 1, 1978, and the motion was filed that day. A hearing on this motion was had on July 27, 1978.

At both hearings and in their briefs the Defendants in this proceeding whose documents were subpoenaed from Plaintiffs strongly opposed the motions on many grounds.

It should be made clear at the outset that the technical validity of the subpoena is not at issue. That question has never been squarely put before this Court by either of the two motions above mentioned or by any other party to this proceeding. The sole question is whether Congress can subpoena documents in the hands of a litigant in a Federal Court proceeding from that litigant who would not otherwise have them except for the discovery procedures of the Federal Courts when there has been no showing of extraordinary circumstances.

The Court has reached the conclusion that the motion of the Subcommittees must be denied.

The Federal Courts and the Congress have two different roles under our Constitution. Congress has the power and responsibility to enact legislation under its enumerated powers and the "necessary and proper clause" of the Constitution.[2] The Federal Courts have the power to hear all cases and controversies arising under the Constitution and laws of the United States.[3] Congress has the power

[2] Article I, Section 8.

[3] Constitution. Article III. *Marbury* v. *Madison,* 5 U.S 133, 2 L.Ed. 60 (1803).

to circumscribe the jurisdiction of the various Federal Courts[4] and may pass laws which regulate the procedures in the Federal Courts[5] but has not the power to interfere in a particular case.

The Fifth Amendment to the Constitution states in part: ". . . nor be deprived of life, liberty, or property, without due process of law, ..." Due process must entail the hearing of a case by a Federal Court without the interference of one of the other branches of the Government.[6]

In the instance before the Court now, the persons whom the Subcommtttees have subpoenaed would not have possession of the subpoenaed documents but for the discovery rules of the Federal Courts. Congress by subpoenaing these documents is interfering with the processes of a Federal Court in an individual case.[7] Had not a protective order been in force covering the documents, the Court would have entertained a motion for one.

Whether or not Messrs. Freie, Hawkins and Cochrane should have turned over any other documents to the Subcommittees given to them as a result of the discovery processes of this Court has not been presented to this Court and is probably a matter more of form than of substance since the other documents, not being covered by a protective order, have been spread upon the public record in the files of the Clerk of this Court.

[4] Ibid.

[5] *Wayman* v. *Southard,* 23 U.S. 1, 6 L.Ed. 1 (1825). in a particular case.

[6] *Kilbourn* v. *Thompson,* 103 U.S. 168, 26 L.Ed. 377 (1880).

[7] The Subcommittees have not based their motion on any extraordinary need for these items to be subpoenaed from these individuals, so the question of extraordinary circumstances as a justification for the subpoena will be ignored by the Court.

For the reasons stated the motion of the Subcommittees for clarification or modification of this Court's protective order is denied. Defendants' attorneys are requested to prepare and submit appropriate form of order.

/s/ W. M. Taylor Jr.
United States District Judge

Aug. 17, 1978
Date

APPENDIX

THE COURT: Well, gentlemen, I can appreciate Mr. Hawkins and Mr. Cochrane's discomfort. Mr. Hawkins said something about somebody serving his time if found in contempt of Congress. I wonder if he wants to trade places with me and decide one of these, what appears to be a confrontation between Congress and the Judiciary, in connection with the Judiciary the responsibility to administer justice.

Now it appears to me, I may oversimplify the matter, it appears to me that Congressman Moss' committee is relying upon Eastland versus United States Servicemen's Fund and Judge Hart's opinion in the Gulf case, and apparently the committee thinks that that case gave Congress carte blanche to do anything that it wanted to do free from any review by the Courts.

Now throughout all of these cases that I have read and have been cited in these briefs, that is those cited in the briefs that I have been able in that time to read, it is consistently held that resolutions, subpoenas, even statutes enacted by Congress are subject to review and who but the Courts can exercise that power to review. Doesn't that go back to Marbury versus Madison or some such case as that, but in any event the Eastland case by the Supreme Court did not involve a court order, that is a

court order, protective order as in this case. There the Court was saying simply that members of Congress are free, as I read the case, are free from interference by being hailed into Court in connection with their activities in their Congressional duties. It is inconceivable to me that Congress would or a committee of Congress would just run roughshod over an order of Court entered in connection with the disposition or trial or preparation of a case pending in Court. I just can't believe that Congress would undertake to do that or would do it. And it's also a little difficult for me to believe that the Justice Department would pursue a contempt matter, a contempt of Congress matter where lawyers in the position that Mr. Hawkins and Mr. Cochrane are, being under an order of this Court not to divulge this information. The information Congress seeks is available elsewhere and as I understand the record subpoenas have been issued for that purpose to acquire the information from some other source. I just cannot — Well, I don't think it would be proper for this Court under these circumstances where this Court has entered a protective order, just because Congress wants to get all of the information that some of the lawyers have, just step aside and say, "Well, go right ahead." I think the orders of a Federal Court in its undertaking to dispose of cases, of lawsuits, have some significance and some importance. I'm going to deny the motion to modify or amend the order.

As I said, I understand the uncomfortable position that Mr. Hawkins and Mr. Cochrane may be in, but I think the order of this Court and this matter is important enough that it should be maintained and not set aside or modified.

Now, it was suggested that the committee should be before the Court. Of course, the Court is not going to subpoena the committee to come down and defend itself or anything of that kind. One of the counsel did call Mr. Purdy, my law clerk, about the matter.

Now, this order of mine refusing to amend or correct the protective order or relieve Mr. Hawkins of the effect of that order, of course, is without prejudice to the right of the committee and its counsel might well work out a confidential order or an agreement with the parties at interest here. So, I am going to deny the motion and, so to speak, let the chips fall where they may.

IN THE UNITED STATES COURT OF APPEALS

For The Fifth Circuit

PUBLISH

No. 78-3344

IN RE: BEEF INDUSTRY ANTITRUST LITIGATION,
NEAL SMITH, ET AL.,

Plaintiffs-Appellants,

versus

THE NATIONAL PROVISIONER, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(FEBRUARY 2, 1979)

Before THORNBERRY, FAY and RUBIN, Circuit Judges.
RUBIN, Circuit Judge:

The chairmen of two subcommittees of the House of Representatives and the Clerk of the House[1] seek to intervene in an antitrust suit pending in district court among private litigants in order to gain access to documents subpoenaed by the subcommittees from a party to the litigation. The documents were obtained by the subpeonaed party through discovery. Because the district court refused to modify its standing protective order or to allow the representatives of the party under subpoena to comply,

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[1] Congressman Neal Smith is the Chairman of the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business. Congressman John E. Moss is Chairman of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce. Hon. Edmund L. Henshaw, Jr. is the Clerk of the House. His interest in the case is not apparent from the briefs. *But see* Rule III (3), Rules of the House of Representatives for the 95th Congress, H.R. Doc. No. 94-663, 94th Cong., 2d Sess. (1977) (Clerk to affix the seal of the House to all subpoenas.)

the chairmen have appealed to this court. On a motion to dismiss, we must consider whether the action is properly before us.

There can be no doubt that the privilege of confidentiality, now embodied in Rule 26(c), Federal Rules of Civil Procedure, is a creation of Congress, just as are the rules relative to the procedure for obtaining subpoenas, *e.g.*, F.R.C.P. 45, and for intervention in pending lawsuits, F.R.C.P. 24. *See* 28 U.S.C. § 2071. The issue before us does not relate to the power of Congress but to whether Congress has acted. *Cf.* United States v. Gustin-Bacon Division, Certain-Teed Products Corp., 10 Cir. 1970, 426 F.2d 539, 542, *cert. denied*, 400 U.S. 832, 91 S.Ct. 63, 27 L.Ed.2d 63. It is respect for the duties and power of Congress, as set forth in Article I of the Constitution, that requires us to inquire whether Congress has authorized what these congressmen, as chairmen of their respective subcommittees, seek to do. Congressional committees are themselves the offspring of Congress; they have only those powers authorized by law; they do not have an unlimited roving commission merely by virtue of their creation and existence to ferret out evil or to uncover inequity. If Congress as a whole has created a privilege, then it is the duty of the court to protect it against violation even by a committee of that Congress. Such judicial action manifests respect for the law-making authority of the legislative branch of the government, not a lack of cooperation with its investigative efforts.

The appeal is related to a pending private antitrust suit, *In re* Beef Industry Antitrust Litigation (N.D. Tex., M.D.L. No. 248). In October 1976, the district court issued an extensive protective order based on Rule 26(c), F.R.C.P. The order allows documents and deposition testimony to be designated as confidential, and provides in part:

> Any information designated as confidential information shall not be made available to persons other than qualified persons or the party who produced the confidential information.

An exception is made if the court orders disclosure, or if the party designating the information as confidential consents to disclosure.

Two subcommittees of the House of Representatives, the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, learned of the existence of the antitrust suit in the course of investigating the domestic beef industry. Each of the subcommittees issued subpoenas to attorneys representing one of the plaintiffs, the Meat Price Investigators Association, and to an officer of the Association, demanding documentary material obtained by MPIA from other parties during the course of discovery in the antitrust suit. The validity of the subpoenas was not challenged; however, because some of the material requested by the subcommittees was subject to the district court's protective order, MPIA moved for the court's permission to comply with the congressional subpoenas. The court denied permission, but without prejudice to the right of the subcommittees to ask for relief on their own behalf. The chairmen of the two subcommittees did not seek to intervene in the suit; instead they sought leave to file a motion to grant MPIA's request, or for clarification or modification of the protective order. The court allowed the motion to be filed, but denied the relief requested. The two chairman then appealed the trial court's denial of their motion. No party to the litigation joined in the appeal.

Before assessing the respective positions of the litigants, it is appropriate to consider the effect of the chairmen's failure to comply with the procedure for intervention established by Rule 24(c), F.R.C.P.[2] Some courts have held

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[2] This issue was not discussed by the parties; however, we consider it of sufficient importance to raise sua sponte. *See* SEC v. Lincoln Thrift Ass'n., 9 Cir. 1978, 577 F.2d 600, 602.

that it is reversible error to conduct any proceedings at the behest of parties who have failed to intervene formally pursuant to Rule 24(c). *E.g.*, Spangler v. Pasadena City Board of Education, 9 Cir. 1977, 552 F.2d 1326. *See also* Moten v. Bricklayers, Masons and Plasterers International Union, D.C. Cir. 1976, 543 F.2d 224. Other courts have been willing to ignore technical defects in the intervention process. *E.g.*, United States v. Louisiana, 5 Cir. 1976, 543 F.2d 1125; Smartt v. Coca-Cola Bottling Corp., 6 Cir., 1964, 337 F.2d 950, *cert. denied*, 1965, 380 U.S. 934, 85 S.Ct. 941, 13 L.Ed.2d 822. Occasionally, courts have been willing to overlook a total failure to comply with Rule 24(c). *E.g.*, SEC v. Lincoln Thrift Association, 9 Cir. 1978, 577 F.2d 600; Roach v. Churchman, 8 Cir. 1972, 457 F.2d 1101.

The Fifth Circuit has been lenient in hearing the appeals of non-parties. In Overby v. United States Fidelity and Guaranty Co., 5 Cir. 1955, 224 F.2d 158, 162, we allowed the Acting Secretary of the Treasury, "whether or not he was formally recognized as a party to the suit," to appeal an order requiring the production of bank records in the bank's suit against its surety company because the Secretary had asserted that the records were privileged. A few years later, in Caswell v. Manhattan Fire & Marine Insurance Co., 5 Cir. 1968, 399 F.2d 417, we held that a nonparty could appeal the denial of his motion to quash a subpoena. Finally, in United States v. United Fruit Co., 5 Cir. 1969, 410 F.2d 553, *cert. denied*, 396 U.S. 820, 90 S.Ct. 59, 24 L.Ed.2d 71, we allowed a nonparty to appeal the denial of its motion for permission to inspect and copy progress reports and programs sealed under a protective order. Although the panel considered whether it had jurisdiction over the case, it did not examine whether the nonparty had any right to file a motion with the district court, or to appeal without complying with Rule 24(c).

There is no question that the procedurally correct course for the chairmen would have been first to obtain status

in the suits as intervenors. *See* SEC v. Lincoln Thrift Association, *supra*, 577 F.2d at 603. However, we note that the district court denied the plaintiffs' motion for leave to comply with the congressional subpoenas, "without prejudice to the right of the Committee and its counsel to appear before this court and ask for the relief that it seeks." This could be construed as an invitation to the chairmen to file their motion without first seeking formal intervention; indeed, the appellees use the words "permitted to intervene" when referring to the appellants' status in the motion to dismiss. *See* West v. Radio-Keith-Orpheum Corp., 2 Cir. 1934, 70 F.2d 621, 624, cited in SEC v. Lincoln Thrift Association, *supra*, 577 F.2d at 602 (creditors had standing because they were "brought in in invitum"). *Compare* United States v. United Fruit Co., *supra*, 410 F.2d at 554 ("The [protective] order provided that third parties could not, without an express order of the court inspect or copy any document submitted. . . ."); Roach v. Churchman, *supra*, 457 F.2d at 1104 (affording relief to a participant without formally naming it as a party deemed "equivalent to authorizing" intervention). In view of our lenience in the past and the fact that the district court's acts might be considered equivalent to authorizing intervention, we will not dismiss for the failure to comply with Rule 24(c), but we will assume that the district court implicitly authorized the chairmen to intervene. However, we reiterate that a formal motion for intervention should have been filed pursuant to Rule 24(c). Future litigants should not attempt to use this opinion to circumvent the clear requirements of the rule. We now turn our attention to the issues raised by the litigants.

In response to the appeal filed by the chairmen, one of the defendants, The National Provisioner, Inc., filed a motion to dismiss because neither subcommittee had obtained authorization from the House of Representatives before it sought to file the motion in the district court; we note ourselves that neither has obtained authority

to appeal. The premise of the motion to dismiss is that authorization is required by Rule XI, cl. 2(m)(2)(B) of the Rules of the House of Representatives for the 95th Congress, H.R. Doc. No. 94-663, 94th Cong., 2d Sess. (1977), before a congressman may appear in court on behalf of a committee or subcommittee; that rule provides:

> Compliance with any subpena [sic] issued by a committee or subcommittee . . . may be enforced only as authorized or directed by the House.

The position of the chairmen is that authorization under this rule is not required both because they seek modification of a court order rather than judicial enforcement of a congressional subpoena and also because they do not desire to retain outside counsel to represent their subcommittees in court. However, they point to no other rule and to no statute that confers general authority to prosecute or intervene in law suits or undertake other actions in the courts.

While the opinion of two congressmen on the applicability of a rule of the House is certainly entitled to serious consideration by this court, we note that legislative committees and congressmen have been held to observance of the rules of Congress and that those rules are judicially cognizable. Yellin v. United States, 1963, 374 U.S. 109, 114, 83 S.Ct. 1828, 1832, 10 L.Ed.2d 778, ... *See also* Christoffel v. United States, 1949, 338 U.S. 84, 69 S.Ct. 1447, 93 L.Ed. 1826. In interpreting the meaning and scope of the House rule, it is appropriate to examine congressional practice under that rule. *See* Yellin v. United States, 374 U.S. at 116-17, 83 S.Ct. at 1833, 10 L.Ed.2d at ..... .

One of the chairmen before us, Representative John E. Moss, has previously intervened on behalf of the Subcommittee on Oversight and Investigations in a then-pending case, Ashland Oil, Inc. v. FTC, D.D.C. 1976, 409 F.Supp. 297, *aff'd*, D.C. Cir. 548 F.2d 977 (per curiam).

That case arose when Ashland Oil sought to enjoin the Federal Trade Commission from transferring secret information obtained from Ashland (apparently not in the course of litigation) to the Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce at the request of Subcommittee Chairman Moss. A week after Ashland Oil obtained a temporary restraining order, the subcommittee authorized a subpoena for the documents. *Id.* at 301. On the same day, Congressman Moss filed a resolution for authorization from the House to intervene with special counsel in the suit that Ashland Oil had filed seeking to enjoin the FTC from transferring the documents to the subcommittee.[3] H. R. Res. 899, 94th Cong., 1st Sess. (1975). *See* 121 Cong. Rec. 38213.

The resolution passed by the House authorized Congressman Moss to "intervene and appear" in the pending action in district court on behalf of the committee. The report accompanying the resolution, H. R. Rep. No. 94-756, explained why the resolution was necessary. It noted, "The Supreme Court has ruled that a committee (or subcommittee) must have specific authority from the appropriate House in order to undertake *any court action.* Reed v. County Commissioners, 277 U.S. 376 (1928)."[4] (Emphasis

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[3] Rule XI, cl. 2 (m)(2)(B) of the Rules of the House of Representatives for the 94th Congress, H. R. Doc. No. 93-416, 93d Cong., 2d Sess. (1975) is identical to the previously quoted rule of the 95th Congress.

[4] In Reed v. County Commissioners, 1928, 277 U.S. 376, 48 S.Ct. 531, 72 L.Ed. 924, the Supreme Court dismissed a suit brought to compel the production of documents because the members of the committee were not specifically authorized by the Senate to bring suit. Specific authorization has also been required in the context of prosecutions for contempt of Congress. *Cf.* Gojack v. United States, 1966, 384 U.S. 702, 716, 86 S.Ct. 1689, 1698, 16 L.Ed.2d 870, ... ("the line of authority from the House to the Committee and then to the subcommittee must plainly and explicitly appear").

supplied.) H. R. Rep. No. 94-756 at 22. The resolution was approved with unanimous consent. 121 Cong. Rec. 41707 (1975). After obtaining authorization, Congressman Moss sought and was granted leave to intervene in the suit pursuant to F.R.C.P. 24(a). 409 F. Supp. at 301.

In *Ashland Oil,* Congressman Moss was not seeking to obtain judicial enforcement of a congressional subpoena; he intervened to obtain the dissolution of the temporary restraining order that prevented the FTC from sending requested documents to his committee, and to oppose any temporary or permanent injunction that Ashland Oil might have sought to prevent the transfer of the documents for a longer period. Moreover, although special counsel was authorized in H. R. Res. 899, that was not the sole purpose of the resolution; it is clear that the resolution was submitted and passed because the Congressman himself stated that he needed such authorization. *See, e.g.,* H. R. Rep. No. 94-756 at 20-21. Neither the resolution nor the accompanying report provide any basis to support the view that under the House rules authorization is required only when special counsel is to be retained.

Thus based on the practice in the House of Representatives, as revealed by Congressman Moss's actions in the *Ashland Oil* case, it is apparent that Rule XI, cl. 2(m)(2)(B) requires House authorization not only for direct enforcement of a subpoena but also in any instance when a House committee seeks to institute or to intervene in litigation and, of course, to appeal from a court decision, particularly when the purpose is, as here, to obtain the effectuation of a subpoena. Congressmen Smith and Moss failed to obtain a House resolution or any other similar authority before they sought to intervene in the beef industry case. If every subcommittee of the Congress is to have inherent authority to intervene in pending suits, to file motions in litigation throughout the nation and to prosecute appeals from district court decisions, a general grant of authority by statute or resolution would appear appropriate. In the absence either of such a general authorization or specific authorization for the actions here taken, the motion to dismiss the appeal is granted.[6]

[6] In view of our disposition of the case, we need not consider, sua sponte, the question of the mootness of the congressional subpoenas. Since the 95th Congress has adjourned, the subpoenas may no longer be in force. *See* Eastland v. United States Servicemen's Fund, 1975, 421 U.S. 491, 512, 95 S.Ct. 1813, 1826, 44 L.Ed.2d 324, ... Neither need we consider the validity of the technical objection that, in filing the appeal, the chairmen appeared to act individually and not in their official capacities on behalf of their committees. For the purpose of this opinion, we have assumed, without deciding, that Congressmen Smith and Moss are acting on behalf of their respective committees.